Opinion

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 74-1667

UNITED STATES OF AMERICA, *Appellant,*

v.

LOUIS POMPONIO, *Appellee.*

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge.

No. 74-1668

UNITED STATES OF AMERICA, *Appellee,*

v.

CHARLES J. PILUSO, *Appellant.*

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Oren R. Lewis, District Judge.

Argued October 4, 1974 Decided February 7, 1975

Before BUTZNER, RUSSELL and FIELD, Circuit Judges.

Frank W. Dunham, Jr., Assistant United States Attorney, (David H. Hopkins, United States Attorney, on brief) for Appellant in No. 74-1667; Alan Y. Cole (Lee A. Schutzman & Cole and Groner on brief) for Appellee in No. 74-

1667; Albert J. Ahern, Jr. for Appellant in No. 74-1668; Thomas K. Moore, Assisant United States Attorney, (Brian P. Gettings, United States Attorney, on brief) for Appellee in No. 74-1668.

FIELD, Circuit Judge:

The principal question on these appeals is the sufficiency of an indictment returned by a grand jury in the Eastern District of Virginia aganist Louis J. Pomponio, Jr., along with his brothers, Peter and Paul Pomponio, and their attorney, Charles J. Piluso, charging them with violating and conspiring to violate the Travel Act, 18 U.S.C. § 1952.[1]

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[1] 18 U.S.C.

§1952. Interstate and foreign travel or transportation in aid of racketeering enterprises.

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury. As amended Pub. L. 91-513, Title II, § 701(i)(2), Oct. 27, 1970, 84 Stat. 1282.

The charges in the indictment stemmed from payments totaling over $300,000 allegedly made by the defendants to Sidney M. Zneimer, a Vice President of the Royal National Bank in New York City, for the purpose of influencing his conduct relative to a number of loans made by the bank to corporations owned or controlled by the Pomponios.

The indictment tracks the language of the statute charging that the defendants "did willfully travel from the State of Virginia to the State of New York, with the intent to promote, manage, carry on, and facilitate the promoting, managing, establishing and carrying on of an unlawful activity, said unlawful activity being the crime of bribery, in violation of the laws of the State of New York (New York Penal Law Article 180) [2] and of the United States Title 18, United States Code, Section 215); [3] the said unlawful activity relating to the efforts of LOUIS J. POMPONIO, JR., CHARLES J. PILUSO and PAUL POMPONIO to influence Sidney M. Zneimer in the performance of his duties at the

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[2] § 180.00. Commercial bribing

A person is guilty of commercial bribing when he confers, or offers or agrees to confer, any benefit upon any employee, agent or fiduciary without the consent of the latter's employer or principal, with intent to influence his conduct in relation to his employer's or principal's affairs.

Commercial bribing is a class B misdemeanor.

[3] § 215. Receipt of commissions or gifts for procuring loans.

Whoever, being an officer, director, employee, agent, or attorney of any bank, the deposits of which are insured by the Federal Deposit Insurance Corporation, of a Federal intermediate credit bank, or of a National Agricultural Credit Corporation, except as provided by law, stipulates for or receives or consents or agrees to receive any fee, commission, gift, or thing of value, from any person, firm, or corporation, for procuring or endeavoring to procure for such person, firm, or corporation, or for any other person, firm, or corporation, from any such bank or corporation, any loan or extension or renewal of loan or substitution of security, or the purchase or discount or acceptance of any paper, note, draft, check or bill of exchange by any such bank or corporation, shall be fined not more than $5,000 or imprisoned not more than one year or both.

Royal National Bank by giving the said Sidney M. Zneimer checks, as detailed in the table below * * *."[4]

Prior to trial the defendants filed a motion to dismiss the indictment on the ground that neither commercial bribery under the New York statute nor the receipt of commissions or gifts by a bank official proscribed by section 215 of the federal code constitute "unlawful activity" within the purview of section 1952. Judge Oren R. Lewis declined to grant the motion and set the case for trial. However, Louis J. Pomponio, Jr., was hospitalized because of illness and the trial proceeded against the other three defendants. The court granted a motion for judgment of acquittal of Peter Pomponio and the jury returned a verdict of not guilty with respect to his brother Paul. Charles J. Piluso was found guilty on all three counts and has appealed his conviction in Case No. 74-1668. Thereafter, Louis J. Pomponio, Jr. was tried before Judge Albert V. Bryan, Jr., and was found guilty by the jury. During the course of this trial, Pomponio's counsel challenged the sufficiency of the indictment in a motion for judgment of acquittal. Judge Bryan, understandably, felt bound by the earlier ruling of Judge Lewis and denied the motion. However, Judge Bryan granted Pomponio's post-trial motion for arrest of judgment, holding that "Section 215 of Title 18 of the U. S. Code and the New York Penal Code, in my view do not come within the unlawful activity definition of Section 1952 of Title 18." The government has appealed this action in Case No. 74-1667.[5]

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[4] Although the indictment contained one conspiracy count under 18 U.S.C. § 371 and eight substantive counts, the government proceeded to trial on the conspiracy count and only two of the substantive counts, Counts Nos. V and IX. The quoted language is from Count No. V of the indictment, but charging language to the same effect was employed in the conspiracy count as well as Count No. IX.

[5] The motion in arrest of judgment was granted pursuant to Rule 34, Fed. R. Cr. P., and is appealable under 18 U.S.C. § 3731. *See* Esposito v. United States, 492 .2d 6 (7 Cir. 1974).

Primarily, the defendants contend that the word "bribery" as used in the Travel Act is intended to mean bribery in the classic sense of the common law which was limited to the corruption of public officials in the administration of their public trust and does not extend to such conduct by private individuals. Concededly, the crime of bribery was originally limited to cases involving the corruption of those in the public service,[6] and some statements in the limited legislative history of the Act might appear to support the position of the defendants.[7] However, while the states and the federal government have enacted statutes dealing with the corruption of public officials, they have also extended the concept of bribery into areas of private conduct which we think appropriately fall within the ambit of the Travel Act.[8] "There can be no question but that any crime of bribery involves moral turpitude,"[9] and we discern no reason why the Congress, in using the term "bribery," intended that it be limited to the corruption of public officials.[10] We find the answer to this contention of the defendants in *United States* v. *Nardello*, 393 U.S. 286,

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[6] *See* 3 Wharton's Criminal Law and Procedure, §§ 1380, et seq., (R. Anderson Ed. 1957).

[7] See Hearing on S. 1654-58, S. 1665 Before the Senate Committee on the Judiciary, 87th Cong., 1st Sess. (1961).

[8] *See, e.g.*, 18 U.S.C. §§ 201, 203, 210, 211 and 214; N.Y. Penal Law §§ 200.00 and 200.10 (McKinney 1973), bribery of a public servant and bribe receiving by a public servant; N.Y. Penal Law §§ 180.15 and 180.25 (McKinney 1967), bribery of a labor official and bribe receiving by a labor official; N.Y. Penal Law §§ 180.40 and 180.45 (McKinney 1967), sports bribing and sports bribe receiving.

[9] United States v. Esperdy, 285 F.2d 341, 342 (2 Cir. 1961).

[10] In the Southern District of New York one judge has reached the conclusion that commercial bribery under the New York statute does not fall within section 1952. United States v. Niedelman, 356 F.Supp. 979 (1973). However, he acknowledges that "[s]imilar contentions have heretofore been considered and rejected in this District [in four other decisions]." *Id.* at 981.

292-293 (1969), where a similar argument with respect to the meaning of the word "extortion" in the Act was urged upon the Court. In rejecting this argument the Court stated:

> "Appellees suggest, however, that Congress intended that the common-law meaning of extortion—corrupt acts by a public official—be retained. If Congress so intended, then § 1952 would cover extortionate acts only when the extortionist was also a public official. Not only would such a construction conflict with the congressional desire to curb the activities of organized crime rather than merely organized criminals who were also public officials, but also § 1952 imposes penalties upon any individual crossing state lines or using interstate facilities for any of the statutorily enumerated offenses. The language of the Travel Act, 'whoever, crosses state lines or uses interstate facilities, includes private persons as well as public officials."

Paraphrasing the language of the Court in *Nardello*, "[i]n light of the scope of the congressional purpose we decline to give the term [bribery] an unnaturally narrow reading • • • and thus conclude that the acts for which [defendants] have been indicted fall within the generic term [bribery] as used in the Travel Act." 393 U.S. at 296.

The defendants further contend that since 18 U.S.C. § 215 criminalizes only the act of the bank officer who receives the proscribed thing of value, they as payors could not be convicted of an offense under that statute [11] and, accordingly, it was improperly designated as an "unlawful activity" in the indictment.[12] As pointed out in *United States* v.

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[11] Incident to this contention, counsel in their arguments and briefs discussed at some length the dichotomy with respect to the question of whether the payor can be convicted as an aider and abettor under a statute such as 18 U.S.C. § 215. *See* United States v. Kenner, 354 F2d 789 (2 Cir. 1965); United States v. Bowles, 183 F.Supp. 237 (D.C. Me. 1958); *cf.* May v. United States, 175 F.2d 994 (D.C. Cir. 1949); *see also* United States v. Johnson, 337 F.2d 180 (4 Cir. 1964).

[12] Defendants take the position that if either the New York commercial bribery law or the federal statute was improperly included

Wechsler, 392 F.2d 344 (4 Cir. 1968), the fallacy in such an argument lies in a too heavy reliance on the role played by section 215 in the indictment, and elides the fact that it serves "only as a background identification of the unlawful activities."[13] The "unlawful activity" specified in the Act may be bribery under either state or federal law and reference to such law is necessary only to identify the type of "unlawful activity" in which the defendants intended to engage. Proof that the unlawful objective was accomplished or that the referenced law has actually been violated is not a necessary element of the offense defined in section 1952. *See United States* v. *Rizzo,* 418 F.2d 71 (7 Cir. 1969); *McIntosh* v. *United States,* 385 F.2d 274 (8 Cir. 1967). Accordingly, we find it sufficient that the indictment charged the defendants with interstate travel with the intent, *inter alia,* to facilitate the violation of the federal statute by Zneimer. Finally, the defendants argue that our construction of the Act improperly escalates these underlying misdemeanors to federal felonies, but such a contention has been summarily rejected by the courts. *United States* v. *Karigiannis,* 430 F.2d 148 (7 Cir. 1970); *United States* v. *Brennan,* 394 F.2d 151 (2 Cir. 1968).

We have considered the other points raised on Piluso's appeal and find no reversible error. Accordingly, the conviction in No. 74-1668 is affirmed. The order of the district court granting Pomponio's motion in arrest of judgment in No. 74-1667 is reversed, and the case is remanded for further proceedings consistent with this opinion.

AFFIRMED IN CASE NO. 74-1668.

REVERSED AND REMANDED
IN CASE NO. 74-1667.

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in the indictment, the indictment must fall. In view of our disposition of the case, we find it necessary to reach this point.

[13] 392 F.2d at 346.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 74-1668

UNITED STATES OF AMERICA, *Appellee,*

v.

CHARLES J. PILUSO, *Appellant.*

Order

Upon consideration of appellant's petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is, therefore, ORDERED, That the petition for rehearing be and it is hereby denied.

For the Court—By Direction.

/s/ WILLIAM K. SLATE, II

Clerk

Opinion of Judge Bryan Granting Arrest of Judgment

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Criminal No. 269-73-A

THE UNITED STATES

v.

LOUIS J. POMPONIO, JR., *Defendant.*

THE COURT: I think the Court of Appeals ought to settle it. I have regard, of course, for the position of my

associate, Judge Lewis, on the same matter. My disagreement with him is just that, and no more. However, the case is now before me for decision on this motion for arrest of judgment. I think the motion is well taken.

I am relieved to find that the Government, in accordance with the *Esposito* case, can appeal. I think the Defendant will be hard put to plead double jeopardy if the Government is successful in its appeal, having cited that case to me in support of its argument that the verdict may be reinstated if it is not reversed on other grounds.

I will, therefore, in accordance with Rule 34, arrest the judgment on the specific ground—and lest there be any mistake about it, I want to make sure that the specific ground of the arrest of judgment is that the indictment, Counts, I, V and IX do not charge an offense, and the reason I am of the view that they do not charge an offense is because the unlawful activity referred to in the indictment as being promoted or furthered by the Defendant, Louis J. Pomponio, Jr., namely, Section 215 of Title 18 of the U. S. Code and the New York Penal Code, in my view do not come within the unlawful activity definition of Section 1952 of Title 18.

I do not believe that there would be a requirement, before the Government would appeal, that sentence be imposed in the case and, therefore, I will postpone sentencing, retaining jurisdiction of the case, however, for sentencing should on appeal the case be reversed.

I hereby certify that the foregoing is a true transcript of the oral statement of the Court from the Bench.

/s/ Frances Webb
Reporter

Indictment

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Criminal No. 269-73

UNITED STATES OF AMERICA

v.

LOUIS POMPONIO, JR.

JULY *1972* SPECIAL TERM GRAND JURY—At Alexandria

THE GRAND JURY CHARGES:

A. 1. That the defendants, LOUIS J. POMPONIO, JR., PAUL POMPONIO and PETER POMPONIO, hereinafter referred to either individually or as "the POMPONIOS," at all times mentioned in this indictment, maintained residences and offices in the State of Virginia and were endeavoring through a network of family controlled corporations to build, own and operate high-rise buildings in Northern Virginia and the District of Columbia.

2. That the defendant, CHARLES J. PILUSO, Esquire, at all times material herein, maintained a residence and an office in the State of Virginia and was associated in the endeavors of the brothers referred to in paragraph A. 1. above.

3. That Sidney M. Zneimer, at all times material herein, resided in the State of New York and was a vice president of the Royal National Bank and worked at the offices of said bank located in New York City in the State of New York with general responsibility for reviewing and evaluating requests for construction loans, arranging for participation by other lending organizations when an approved loan request was contingent on such arrangements being

made, and general administration of the loan, including authorization of progress advances.

4. That at all times material herein, the Royal National Bank was a national banking institution located and conducting business in the State of New York.

5. That at all times material herein:

a. Martin Van Buren Corporation was owned and controlled by the POMPONIOS for the principal purpose of owning land and the Martin Van Buren Building located thereon during and subsequent to construction of said building.

b. James Polk Corporation was owned and controlled by the POMPONIOS for the principal purpose of owning land and the James Polk Building located thereon during and subsequent to construction of said building.

c. Abington Realty Corporation was owned and controlled by the POMPONIOS for the principal purpose of owning land and the Pomponio Plaza East Building located thereon during and subsequent to construction of said building.

d. National Center Corporation was owned and controlled by the POMPONIOS for the principal purpose of obtaining and owning land and developing on it what later became known as the National Center in Arlington, Virginia.

e. Federal Realty and Development Corporation was owned and controlled by the POMPONIOS for the principal purpose of owning land and the Commonwealth Building located thereon during and subsequent to construction of said building.

f. James Buchanan Corporation was owned and controlled by the POMPONIOS for the principal purpose of owning land and the James Buchanan Apartments located

thereon during and subsequent to construction of said apartments.

g. Zachary Taylor Corporation was controlled by the POMPONIOS for the principal purpose of owning land and the Zachary Taylor Building located thereon during and subsequent to construction of said building.

• • •

i. Virginia Corporation was controlled by the POMPONIOS for the principal purpose of owning land and the Patrick Henry Building located thereon during and subsequent to construction of said building.

6. That at all times material herein, it was a violation of the criminal laws of the State of New York for any person to confer any benefit upon any employee, agent or fiduciary without the consent of the latter's employer or principal, with intent to influence his conduct in relation to his employer's or principal's affairs.

7. That at all times material herein, Real Equity Consultants was a corporation controlled, owned and operated by Sidney M. Zneimer for the benefit of Sidney M. Zneimer.

B. That commencing on or about September 1, 1967, and continuously thereafter up to and including the date of this indictment, the exact dates to the grand jurors being unknown, in the Eastern District of Virginia and elsewhere, the defendants, LOUIS J. POMPONIO, JR., PETER POMPONIO, PAUL POMPONIO and CHARLES J. PILUSO, did knowingly, willfully and unlawfully combine, conspire, confederate and agree with each other and with Sidney M. Zneimer, an unindicted co-conspirator, and with divers other persons to the grand jury unknown, to commit certain offenses against the United States, in violation of the provisions of Section 1952 of Title 18, United States Code in that the defendants would travel and willfully cause others to travel in interstate comerce and that they would use and will-

fully cause others to use facilities in interstate commerce, including interstate banking facilities, * * *, air terminals, commercial limosine service, credit cards, and commercial air travel, all of the above with the intent to promote, manage, establish, and carry on and facilitate the promoting, managing, establishing and carrying on of an unlawful activity, said unlawful activity being the crimes of commercial bribery, in violation of the laws of the State of New York and the paying of commissions to an officer of a bank, the deposits of which were insured by the Federal Deposit Insurance Corporation, for procuring loans from said bank, in violation of Title 18, United States Code, Section 215, and it was further a part of the conspiracy that the defendants would thereafter perform and cause others to perform acts promoting, managing, establishing, and carrying on of said unlawful activities and acts facilitating the promoting, managing, establishing, and carrying on of said unlawful activity.

* * * *

COUNT V

B. From on or about March 12, 1970 through November 19, 1971, in the Eastern District of Virginia and elsewhere, LOUIS J. POMPONIO, JR., * * * did willfully travel from the State of Virginia to the State of New York, with the intent to promote, manage, carry on, and facilitate the promoting, managing, establishing and carrying on of an unlawful activity, said unlawful activity being the crime of bribery, in violation of the laws of the State of New York (New York Penal Law Article 180) and of the United States (Title 18, United States Code, Section 215); the said unlawful activity relating to the efforts of LOUIS J. POMPONIO, JR., CHARLES J. PILUSO and PAUL POMPONIO to influence Sidney M. Zneimer in the performance of his duties at the Royal National Bank by giving the said Sidney M. Zneimer checks, as detailed in the table below, and drawn on the Royal National Bank of New York, payable to Real Equity Con-

sultants, Inc., and that thereafter the defendants did perform and attempt to perform the acts of promoting, managing, establishing and carrying on and facilitating the promoting, managing and carrying on of said unlawful activity.

Date of Check	No. of Check	Account	Amount
3/12/70	294	James Buchanan Corp.	$25,000
3/13/70	101A & T-1	Zachary Taylor Corp.	25,000
5/27/70	248	Zachary Taylor Corp.	25,000
10/ 5/70	1010	Columbia Plaza Corp.	25,000
1/ 4/71	145	Virginia Corp.	25,000
1/11/71	1186	Columbia Plaza Corp.	25,000
10/ 6/71	122	Chester Arthur Corp.	25,000

(Violation of Title 18, United States Code, Sections 1952 and 2)

* * * *

COUNT IX

B. On or about December 13, 1971, in the Eastern District of Virginia, LOUIS J. POMPONIO, JR., * * * caused Lewis Payne to travel from the State of Virginia to the State of New York, with the intent to promote, manage, carry on and facilitate the promoting, managing, establishing and carrying on of an unlawful activity, said unlawful activity being the crime of bribery, in violation of the laws of the State of New York (New York Penal Law Article 180) and of the United States (Title 18 United States Code, Section 215); the said unlawful activity relating to the efforts of LOUIS J. POMPONIO, JR., PAUL POMPONIO and CHARLES J. PILUSO to influence Sidney M. Zneimer in the performance of his duties at the Royal National Bank, and that thereafter the defendants did perform and attempt to perform the acts of promoting, managing, establishing and carrying on, and facilitating the promoting, managing and carrying on of said unlawful activity. (Violation of Title 18, United States Code, Sections 1952 and 2)

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Criminal No. 269-73A

UNITED STATES OF AMERICA

v.

LOUIS J. POMPONIO, JR., ET AL.

Motion to Dismiss the Indictment for Failing to State Crimes

The Defendants Louis J. Pomponio, Jr., Peter Pomponio, Paul Pomponio and Charles J. Piluso, through their undersigned attorneys, hereby respectfully request this Honorable Court to dismiss the Indictment on the ground that, since the crimes of commercial bribery and receipt of commissions or gifts for procuring loans are not unlawful activities defined by 18 U.S.C. § 1952, Counts I through IX are deficient as a matter of law and fail to state crimes over which this Court has jurisdiction; all as is more particular set out in the Memorandum of Points and Authorities which is attached hereto and made a part hereof.

Respectfully submitted,

COLE AND GRONER

By /s/ ALAN Y. COLE
Alan Y. Cole
1730 K Street, N.W.
Washington, D.C. 20006

/s/ LEE A. SCHUTZMAN
Lee A. Schutzman
8346 Forrester Boulevard
Springfield, Virginia 22152

Attorneys for Defendants

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Criminal No. 269-73A

UNITED STATES OF AMERICA

v.

LOUIS J. POMPONIO, JR., ET AL.

Memorandum of Points and Authorities in Support of Motion to Dismiss the Indictment for Failing to State Crimes

All of the Defendants are charged in Count I with conspiracy (18 U.S.C. § 371) to violate the Travel Act (18 U.S.C. § 1952) by utilizing the facilities of interstate commerce to carry on the unlawful activity of commercial bribery in violation of the laws of New York (New York Penal Law Article 180) and the paying of commissions to an officer of a bank, the deposits of which were insured by the Federal Deposit Insurance Corporation, for procuring loans from said bank, in violation of 18 U.S.C. § 215.

Counts II through IX charge various of the Defendants with substantive violations of § 1952 and with aiding and abetting (18 U.S.C. § 2) in such violations,[1] in each instance by utilizing the facilities of interstate commerce to carry on certain unlawful activities in violation of the designated laws of New York and the United States. While Counts II through IX refer to the unlawful activities as being "the crime of bribery", they each refer to the laws of New York and the United States which actually define the state crime as commercial bribery and the Federal crime as "receipt of commissions or gifts for procuring loans", respectively. It

[1] These Counts do not indicate who aided and abetted and who were the principals. Presumably, this information will be obtained through a bill of particulars, if the Indictment is not dismissed.

can only be assumed that the omission of the word "commercial" before the word "bribery" in the last eight Counts [2] and the improper designation of the Federal law throughout the Indictment [3] were oversights, and this Memorandum will accordingly treat those Counts as if these laws were properly designated as indicated above.

1. *The Charge In The Indictment*

The legal heart of these Counts is § 1952. This provision was enacted in 1961 in response to then Attorney General Robert Kennedy's request for weapons to combat organized crime. *Hearings on S.1653-1658, S.1665 Before the Senate Committee on the Judiciary,* 87th Cong., 1st Sess. 1-7 (1961) (hereinafter "Senate Hearings").

The portion of the provision relevant to this case is as follows:

> "§ 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises
>
> "(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—
>
> * * * *
>
> "(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

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[2] Counts II through IX refer expressly to New York Penal Law Article 180 and this provision is enttiled "Commercial bribing". Moreover, Paragraph A of Count I is realleged and reiterated as to Counts II through IX and Paragraph A, subparagraph 6 refers only to the New York State crime of commercial bribery rather than to bribery. See Section 3, *infra.*

[3] Count I of the Indictment describes 18 U.S.C. § 215 as prohibiting "*the paying* of commissions to an officer of a bank" (Count I, Paragraph 13). In fact, 18 U.S.C. § 215 prohibits only the "*receipt* of commissions" by such officer. This distinction is dealt with in greater detail in Section 6, *infra.*

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

"(b) As used in this section 'unlawful activity' means . . . *bribery* . . . in violation of the laws of the State in which committed or of the United States." (Emphasis added.) [4]

It should be noted that the unlawful activity denoted in the statute is "bribery", By contrast, the alleged unlawful activity charged in Counts I through IX of the Indictment relates to "*commercial* bribery" and the receipt of commissions for procuring loans by an officer of a bank.

2. *The Crime of Bribery*

At common law the crime of bribery is limited to giving something of value to influence the action of a "public official" or a person whose official conduct is in any way connected with the government. 12 Am.Jur.2d *Bribery* § 2 (1964); see also *Black's Law Dictionary* 239 (Rev. 4th ed. 1968). The giving of something of value to *private* persons to influence non-official action was not comprehended by the crime of bribery.

The Courts of both New York and the United States recognize this difference. So, in *People* v. *Lafaro*, 25 N.Y. 336, 342, 165 N.E. 518, 520 (1929), it was held:

"The gist of the crime of bribery is the wrong done to the people by *corruption in the public service* . . . . We have given to the statutory definition of bribery a construction broad enough to cover cases where a *public officer* has accepted a bribe to act corruptly in a manner to which he bears some relation."

See also *People* v. *Chapman*, 13 N.Y.2d 97, 101, 242 N.Y.S.2d 200, 202, 192 N.E.2d 160, 161 (1963), and 11 C.J.S. *Bribery*

[4] Emphasis is added throughout this Memorandum unless otherwise indicated.

§ 1a (1938) adopting this definition; 11 C.J.S. *Bribery* § 1b expressly draws a distinction between the "crime of bribery" and the "bribery of a private agent or employer to influence his action in relation to his principal's or employer's business."

The United States Supreme Court has adopted a like definition:

> "[The Section] with respect to the acceptance of bribes, provides that 'whoever, being *an officer* of the United States, or a person acting for or on behalf of the United States, in any official capacity, under or by virtue of the authority of any department or office of the government thereof,' accepts money, etc., 'with intent to have his decision or action on any question, matter, cause, or proceeding which may a any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, influenced thereby,' shall be punished as stated. . . . [The Section] as to bribe giving uses similar language in defining the *official relation* of the recipient, and the character of the action intended to be influenced." *United States* v. *Birdsall,* 233 U.S. 223, 229 (1914).

3. *The Commercial Bribery Law of New York*

The section of the New York Penal Law which these Defendants are charged with violating is section 180. It provides as follows:

> "§ 180.00 Commercial bribing
>
> "A person is guilty of commercial bribing when he confers, or offers or agrees to confer, any benefit upon any employee, agent or fiduciary without the consent of the latter's employer or principal, with intent to influence his conduct in relation to his employer's or principal's affairs.
>
> "Commercial bribing is a class B *misdemeanor.*"

The crime of bribery is defined in an entirely different section of the New York Penal Law, Section 200, which provides as follows:

> "§ 200.00 Bribery
>
> "A person is guilty of bribery when he confers, or offers or agrees to confer, any benefit upon a *public* servant upon an agreement or understanding that such *public* servant's vote, opinion, judgment, action, decision or exercise of discretion as a *public* servant will thereby be influenced.
>
> "Bribery is a class D *felony.*"

The distinction between the two is readily apparent. The commercial bribery statute relates entirely to private parties rather than to public officials; it creates a misdemeanor while the bribery statute creates a felony.

4. *18 U.S.C. § 215*

The Federal law which the Defendants are charged with violating is 18 U.S.C. § 215, which is entitled "Receipt of commissions of gifts for procuring loans." It provides as follows:

> "Whoever, being an officer, director, employee, agent, or attorney of any bank, the deposits of which are insured by the Federal Deposit Insurance Corporation, of a Federal intermediate credit bank or of a National Agricultural Credit Corporation, except as provided by law, stipulates for or receives or consents or agrees to receive any fee, commission, gift, or thing of value, from any person, firm, or corporation, for procuring or endeavoring to procure for such person, firm, or corporation, or for any other person, firm, or corporation, from any such bank or corporation, any loan or extension or renewal of loan or substitution of security, or the purchase or discount or acceptance of any paper, note, draft, check, or bill of exchange by any such bank or corporation, shall be fined not more than $5,000 or imprisoned not more than one year or both."

The crime of bribery is defined in an entirely different section of Title 18, Section 201, which provides in relevant part as follows:

"§ 201 Bribery of public officials and witnesses

"(a) For the purpose of this section:

'*public official*' means Member of Congress, or Resident Commissioner, either before or after he has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror; and

'person who has been selected to be a *public official*' means any person who has been nominated or appointed to be a public official, or has been officially informed that he will be so nominated or appointed; and

'*official act*' means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in his *official capacity*, or in his place of trust or profit.

"(b) Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any *public official* or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—

(1) to influence any *official act; or*

(2) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any *fraud*, or make opportunity for the commission of any fraud, *on the United States;* or

(3) to induce such public official or such person who has been selected to be a public official to do or

omit to do any act *in violation of his lawful duty,* or

. . . . .

"(f) Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers, or promises anything of value to any *public official,* former public official, or person selected to be a public official, for or because of any *official act* performed or to be performed by such public official, former public official, or person selected to be a public official;

. . . .

Shall be fined not more than $10,000 or imprisoned for not more than two years, or both."

The distinction between these statutes is readily apparent. The bribery statute, 18 U.S.C. § 201, relates solely to *public officials* rather than private employees, such as bank employees; it relates solely to *official acts and duties* rather than non-public activities, like bank loans; and it creates a felony while § 215 creates only a misdemeanor. The distinctions between § 215 and § 201 are parallel to those between the commercial bribing and bribery statutes in state law except that § 215 does not even mention the word "bribery", although its state counterpart does.

5. *Section 1952 Applies To Bribery Only; Not To Commercial Bribery Or Receipt of Commissions Or Gifts For Procuring Loans*

Since § 1952 is a penal statute, it should be construed narrowly and strictly in accordance with its terms. "A criminal law is not to be read expansively to include what is not plainly embraced within the language of the statute . . . . "*Kordel* v. *United States,* 335 U.S. 345, 348-349 (1948). "Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise * * *. Statutory words are uniformly presumed, unless the contrary appears, to be used in the ordinary and usual sense,

and with the meaning commonly attributed to them." *Caminetti* v. *United States,* 242 U.S. 470, 485-486 (1917).

Both the United States Supreme Court and the Fourth Circuit have interpreted § 1952 restrictively. *See Rewis* v. *United States,* 401 U.S. 743 (1971) and *United States* v. *Hawthorne,* 356 F.2d 740 (4th Cir. 1965), *cert. denied,* 384 U.S. 908 (1966).

Accordingly, since the unlawful activity referred to in Section 1952 is "bribery" and not "commercial bribery" or receipt of commissions by a bank officer, the Section should not be expanded to cover an activity to which it does not refer. Section 1952 does not reach every use of interstate facilities which may violate state or federal law; it reaches only those specifically and expressly enumerated therein. Commercial bribery—a crime plainly distinct from the crime of bribery—is not enumerated therein. Nor is receipt of commissions by a bank officer, the federal counterpart to the state commercial bribery statute. Violations of these sections do not therefore fall within the scope of § 1952.

6. *The Government Is Attempting To Create a New Law Under Which To Prosecute The Defendants*

Section 215 makes unlawful only receipt of commissions or gifts by officers or employees of banks insured by the Federal Deposit Insurance Corporation. This Section is codified in Chapter 11 of Title 18 along with twenty other sections. Of the twenty-one sections, twelve deal with the giving things of value to influence the actions of the recipients. It is significant that of these twelve statutes there are only two in which *only the receiving* of a commission or gift violates the law. 18 U.S.C. § 215, 217. Of the others, nine proscribe the giving as well as the receiving, 18 U.S.C. §§ 201, 203, 209-214 and 216, and one (U.S.C. § 224) makes the giving only unlawful. Thus, it is clear that Congress knew exactly how to criminalize giving, receiving, or both

giving and receiving; and in 18 U.S.C. § 215, it made only receiving criminal.[5]

Since the Congress has thus expressly, obviously and deliberately limited the scope of 18 U.S.C. § 215 to the receipt by a bank employee of commissions relating to loans made by such bank, this Court should not permit the United States Attorney—by relying upon either § 1952 or § 2—to create an entirely different crime. There is no converse, statutory or otherwise, to § 215. It creates a crime only of receiving; it does not create a crime of giving.

This situation may be analogized to statutes making extortion illegal. It has never been suggested that the victim of the extortionist is guilty of criminal conduct because he has capitulated to the extortionist's demands. And it would be inconceivable to suggest that by combining § 1952 and/or § 2 with the extortion statutes of either the Federal Government, 18 U.S.C. §§ 872, 891-894, or of the States, e.g., Pa. Stat. Ann. tit. 18, § 4318, persons who utilized the facilities of interstate commerce and made payments to extortionists have thereby committed crimes against the United States.

The situation in this case is no different. Congress, in its wisdom proscribed *only the receiving* of such payments; it did not proscribe the giving of them. It recognized that when a borrower pays a commission to a bank employee in conjunction with a bank loan, he does so under compulsion and not as a volunteer. In this respect, the giver of the commission to a bank employee is in precisely the same position as the payer of extortion; he is not the target of the proscriptive legislation, he is the intended beneficiary.

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[5] § 215 should be compared in this regard particularly with 18 U.S.C. § 214 which makes unlawful *both* the giving and the receiving of any commissions for loans from any Federal Reserve bank. Compare § 210, which proscribes *giving* for the purpose of obtaining a Federal position with § 211, which proscribes receiving for that purpose. See also § 212 and § 213.

This Court should not countenance the blatant effort of this Indictment to expand the scope of § 215 into an area never heretofore reached and plainly beyond the meaning intended by Congress.

7. *The Legislative History of Section 1952 Confirms That It Is Applicable To Bribery Only*

The testimony of the late Robert F. Kennedy, former Attorney General of the United States, reveals that "[t]he target [of 18 U.S.C. § 1952] is clearly organized crime." Senate Hearings at 16. In referring to the offenses enumerated in 18 U.S.C. § 1952 including "bribery", the Attorney General stated "we are not trying to curtail the sporadic, casual involvement in these offenses, but rather a continuous course of conduct. . . . *American citizens who are not connected with organized gambling and organized crime have nothing to fear . . . The only toes tread on here are those of racketeers and hoodlums. Id.* at 1617. In his statement before the House Judiciary Committee, the Attorney General stated that the bill was aimed at "the huge profits in liquor, narcotics, prostitution, as well as the use of these funds for corrupting *public officials* . . . ." *Id.* at 2. This limited aim of 18 U.S.C. § 1952 has been confirmed by both the Supreme Court of the United States in *Rewis* v. *United States, supra,* and by the United States Court of Appeals for the Fourth Circuit in *United States* v. *Hawthorne, supra.* The primary target of the Travel Act was gambling. The other areas to which it was directed were those related to or arising from gambling. "From the huge gambling profits flow the funds to bankroll the other illegal activities I have mentioned including *the bribery of local officials.*" Senate Hearings at 2.

Conclusion

On the basis of the foregoing, it is clear beyond cavil that the word "bribery" used in § 1952 was intended to and must be construed to mean bribery in the classic sense and

not "commercial bribery" or "receipt of commissions". Such a construction is supported by the plain language of § 1952: it uses the word "bribery" and not the words "commercial bribery" or "receipt of commissions". Such a construction is supported by the legislative history of § 1952 in which there are references to the corruption of "public" and "local" officials and where the intention of the sponsors of the legislation is made abundantly clear. Finally, such a construction is consistent with the canons of construction applicable to the interpretation of criminal statutes which require that such statutes be construed narrowly and strictly and are not to be enlarged beyond the clear meaning of their terms.

There is nothing on the face of § 1952 or in its legislative history to suggest that it was intended to apply to "commercial bribery" or "receipt of commissions" as well as to "bribery".[6]

For all of the foregoing reasons Counts I through IX of the Indictment fail as a matter of law to state crimes over which the Court has jurisdiction and, accordingly, the Indictment should be dismissed.

Respectfully submitted,

COLE AND GRONER

By /s/ ALAN Y. COLE
Alan Y. Cole
1730 K Street, N.W.
Washington, D.C. 20006

/s/ LEE A. SCHUTZMAN
Lee A. Schutzman
8346 Forrester Boulevard
Springfield, Virginia 22152

Attorneys for Defendants

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[6] There is likewise nothing on the face or in the legislative history of § 215 to suggest that the activities of a payor were intended to be made unlawful.

Excerpts from Instructions to the Jury

(Tr. 1207-1208) *Charge of Court.*

Mr. Zneimer is named as a co-conspirator with them and diverse other persons and you need not worry about them, that is general language, to commit certain offenses against the United States, all in violation of § 1952, Title 18, of the Code.

And they spell it out in here and also in violation of Title 18, U.S.C. § 215 of the Code.

Now, you will notice that the conspiracy is to violate these two federal laws 1952 and 215.

(Tr. 1257-1258)

Mr. Cole: * * * I think that in talking about conspiracy at the outset of your charge, you misdefined the conspiracy. You indicated that it was a conspiracy to violate Title 18, U.S.C. § 1952 and also Title 18, U.S.C. § 215.

I don't think that's what the conspiracy here is. I think the conspiracy is only a violation of § 1952.

The Court: You haven't read the indictment.* * *

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

No. 269-73-A

UNITED STATES OF AMERICA

v.

CHARLES J. PILUSO

Judgment and Commitment

On this 26th day of April, 1974 came the attorney for the government and the defendant appeared in person and by counsel

IT IS ADJUDGED that the defendant upon his plea of not guilty and a verdict of guilty on counts one (1), five (5) and nine (9) has been convicted of the offense of Conspiracy —T.18 U.S.C. 371—ct. 1 Interstate transportation in aid of racketeering—T.18 U.S.C. 1952 & 2—counts 5 & 9

as charged in the indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of two (2) years as to each of counts one (1), five (5) and nine (9). Sentence imposed herein shall run concurrently with each other and shall run consecutively with sentences imposed in Cr. Nos. 303 and 304-73-A—U.S. vs. Charles J. Piluso.

IT IS ADJUDGED that on motion of the U.S. Attorney counts two (2), four (4) six (6) and eight (8) are dismissed.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

illegible
United States District Judge.

W. FARLEY POWERS, JR.,
Clerk.

SUPREME COURT OF THE UNITED STATES

No. A-745

CHARLES J. PILUSO, *Petitioner*

v.

UNITED STATES

Order Extending Time to File Petition for Writ of Certiorari

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 3, 1975

/s/ WARREN E. BURGER
Chief Justice of the United States

Dated this 20 day of March, 1975